TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 618

UNITED STATES OF AMERICA EX RELATIONE ETHEL M. McLENNAN, PETITIONER,

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED DECEMBER 30, 1930

CERTIORARI GRANTED MARCH 2, 1931

(35,540)

(35,540)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 618

UNITED STATES OF AMERICA EX RELATIONE ETHEL M. McLENNAN, PETITIONER,

vs.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

INDEX

	Page
Record from supreme court of District of Columbia	1
Caption	1
Petition for mandamus	1
Answer and response to the rule	9
Judgment, appeal, etc	12
Assignment of errors	12
Designation of record	13
Clerk's certificate	13
Proceedings in Court of Appeals of District of Columbia	15
Minute entries	15
Opinion, Robb, J	17
Judgment	18
Opinion, Robb, J., No. 5241	19
Dissenting opinion, Van Orsdel, J., No. 5241	28
Memorandum, Siddons, J., No. 5250, supreme court	33
Opinion, Bailey, J., Nos. 5241-5242, supreme court	35
Designation of record	37
Clerk's certificate	39
Order allowing certiorari	40

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 11, 1931

a. Supreme Court of the District of Columbia

THE UNITED STATES OF AMERICA, Ex Relatione Ethel M. McLennan, petitioner
vs.
RAY LYMAN WILBUR, SECRETARY of the Interior, Department, respondent
} At law No. 76795

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Petition for Mandamus*

Filed June 3, 1929

In the Supreme Court of the District of Columbia

THE UNITED STATES OF AMERICA Ex Relatione Ethel M. McLennan, petitioner
vs.
RAY LYMAN WILBUR, SECRETARY of the Interior Department, respondent
} At law No. 76795

The petition of the United States of America on the relation of Ethel M. McLennan, respectfully represents unto this honorable court:

1. That the said Ethel M. McLennan is a citizen of the United States, and a resident of the State of California.

2. That the said Ray Lyman Wilbur, respondent herein, is the Secretary of the Department of the Interior of the United States, and as such is sued in respect of his official duties as hereinafter more particularly set forth.

3. That Congress by an act approved February 25, 1920 (41 Stat. 437), entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," provides, among other things, in section 1:

"That deposits of * * * oil, oil shale or gas, and lands containing such deposits owned by the United States * * * shall be subject to disposition in the form and manner provided by this act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State, or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities: * * * *Provided further*, That citizens of another country, the laws, customs,

or regulations of which deny similar or like privileges to
2 citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control own any interest in any lease acquired under the provisions of this act."

And in section 13:

"That the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this act a prospecting permit. * * * To prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land wherein such deposits belong to the United States and are not within any known geological structure of a producing oil or gas field," etc.

4. Regulations concerning the issuance of oil and gas permits and leases, under the act of February 25, 1920, and in pursuance thereof, were duly promulgated by the Secretary of the Interior March 11, 1920, and are designated as "General Land Office—Circular No. 672," in which said regulations the necessary qualifications of applicants are set forth as follows:

"1. QUALIFICATIONS OF APPLICANTS.—Pursuant to Section 1 of the act, permits may be issued to (a) a citizen of the United States; (b) an association of such citizens; (c) a corporation organized under the laws of the United States or of any State or Territory thereof; or (d) a municipality."

Section 4 of the aforesaid regulations, under the title "FORM AND CONTENTS OF APPLICATION" provided that no specific form of application is required, but that said application shall be under oath, contain applicant's name and address, "proof of citizenship of applicant, by affidavit or such fact, if native born," etc., a statement that the applicant comes within the requirements of the law in respect of any interest in other oil and gas permits and leases under the act; a description of the land upon which a permit is desired; that the land applied for is not within any known geological structure of a producing oil or gas field; requires of the applicant references as to reputation and business standing, and provides that a bond shall be furnished by applicant, which bond may be filed "within 10
3 days after receipt of notice by the applicant that the permit will be granted when bond is filed," etc.

5. The northwest quarter of section thirty-four, township twenty-six south, range twenty-one east, M. D. M., California containing 160 acres, being public domain of the United States, was, prior to September 24, 1928, covered by an oil and gas permit known as Sacramento 019789, and on September 24, 1928, this permit was ordered canceled by the then Secretary of the Interior. The cancellation was to become effective October 29, 1928, on which date, under instructions from the General Land Office, the register of the United States land office, directed to receive applications for permits under the act of February 25, 1920, between the hours of 9 and 10 a. m., and in the event of there being conflicting applications, to hold a public drawing at 2 p. m. on said day, the successful applicant under regulations then in force being the first qualified applicant whose name was drawn.

6. On October 29, 1928, the said Ethel M. McLennan submitted to the Register of the land office of the United States at Sacramento, California, her application duly executed, in due and proper form

and complying in all respect with the regulations of the Department of the Interior regarding such permit applications, for a permit to prospect for oil and gas upon the land referred to and described as above, a copy of which application is attached hereto and made a part hereof. This application was filed in the United States land office at Sacramento, California, on October 29, 1928, at 10 a. m., and there being another conflicting application, the application of the said Ethel M. McLennan was duly placed in the drawing provided for as hereinabove stated.

7. This applicant, Ethel M. McLennan, was the one whose name was first drawn in the United States land office at Sacramento, California, under the procedure directed by the Commissioner of the General Land Office and on November 7, 1928, the register of the United States land office at Sacramento, California, advised the Commissioner of the General Land Office at Washington, D. C., by letter of that date, as follows:

"Letter "'N" of Sept. 24, 1928, canceled oil and gas permit, serial 019789, formerly Visalia 010576, of George Hesse, cancellation effective Oct. 29, 1928.

"Description of land:

"NW¼ Sec. 34, T. 26 S., R. 21 e., M. D. M.

"Two applications were filed for the land between the hours of 9 and 10 a. m. on Oct. 29, 1928. Drawing held at 2 p. m. same day.

"Successful applicant:

"Ethel M. McLennan, Serial 023466 Drew No. 1.

"Unsuccessful applicant:

"Wilbur O. Retherford, Serial 023465 Drew No. 2.

"The applications are transmitted herewith.

"Very respectfully,

"JOHN C. ENY, *Register*."

8. On March 13, 1929, a telegram was forwarded to the various United States land offices including United States land office at Sacramento, California, which telegram was signed by the then Commissioner of the General Land Office and approved by the Secretary of the Interior, stating and directing that—

"No oil and gas prospecting permits will be issued on or after March twelfth, nineteen twenty nine. Reject all applications for oil and gas permits now pending in your office and receive no more. All orders for drawings hereby revoked.

"SPRY, *Commissioner*.

"Approved:

"RAY LYMAN WILBUR, *Secretary*."

9. On March 13, 1929, the Department of the Interior released the following memorandum for the press:

"IMMEDIATE RELEASE

"MARCH 13, 1929.

"Secretary Wilbur, of the Department of the Interior, to-day asked the Commissioner of the General Land Office to send instructions to all local land offices to the effect that they are not to receive further applications for permits to prospect for oil and gas on the public domain, and to reject all applications now pending.

"These instructions are in accordance with the statement issued at the White House yesterday to the effect that 'there will be complete conservation of Government oil in this administration.'

"Permits to prospect for oil and leases of land for its development have in the past been issued under the act of February 25, 1920. That act states 'that the Secretary of the Interior is hereby authorized under such necessary and proper rules and regulations as he may prescribe to grant to an applicant qualified under this act a prospecting permit.'

"The General Land Office in its Circular No. 672, says 'It should be understood that under the act, the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied either
6 in part or in its entirety, as the facts may be deemed to warrant.'

"(P. N. 30582.)"

10. On March 26, 1929, the following letter signed by the then Commissioner of the General Land Office and approved by the Secretary of the Interior was addressed to the register of the United States land office at Sacramento, California:

MARCH 26, 1929.

Sacramento (023466 "N" LL.). Ethel M. McLennan, claimant. Oil and gas application for prospecting permit Filed October 29, 1928. Rejected and case closed

REGISTER, *Sacramento, California.*

SIR: Pursuant to instructions issued to the registers of the district land offices approved by the Secretary of the Interior, March 13, 1929, that no oil and gas prospecting permits will be issued after March 12, 1929, and in accordance with the policy announced in departmental order No. 337 of March 16, 1929, the application for oil and gas prospecting permit, serial number and name of applicant appearing above, is hereby rejected and the case closed.

So note your records and advise the parties in interest by ordinary mail, returning and filing fees.

Very respectfully,

WILLIAM SPRY, *Commissioner.*

Approved: March 26, 1929.

RAY LYMAN WILBUR, *Secretary.*

7 11. Departmental order No. 337 of March 16, 1929 referred to in letter of March 26, 1929 quoted in Paragraph 10 hereof reads as follows:

DEPARTMENT OF THE INTERIOR.

Memorandum for the press

IMMEDIATE RELEASE.

March 16, 1929.

Secretary Ray Lyman Wilbur, of the Department of the Interior, to-day issued a departmental order appointing a committee of three to pass upon outstanding permits to prospect for oil and gas on Government lands and to make recommendations as to which of those

permits should be cancelled. The members of that committee are: The Commissioner of the General Land Office, the Director of the Geological Survey, and the solicitor of the department. The order also lays down the general policy with relation to these permits to be followed by the department. In detail it follows:

"The Federal oil conservation policy announced by President Hoover will be energetically executed by the Interior Department.

"There are more than 5,000 applications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the field offices. Steps were taken several days ago toward the rejection of all such applications, and registers of local land offices have been instructed not to receive new applications.

"Probably in none of the cases on hand has the applicant expended money for developmental purposes, although he may have gone to some expense in opposing conflicting claims or furnishing additional evidence in support of his application.

"Where land covered by pending applications is likely to be drained by adjoining wells on privately owned lands, the question of granting permits on Government land will be considered in the light of facts developed by departmental investigation.

"With regard to the 20,000 outstanding permits on public lands, the department will deal fairly with holders who have been diligent in maintaining their equities. Where actual drilling operations have been started and are being continued, opportunity will be given to carry on developmental work to finally determine the character of the land. Immediate steps will be taken, however, to cancel all such permits where no drilling has been done or money spent in development.

"To determine the facts in connection with existing oil and gas permits, I have named a committee consisting of the Commissioner of the General Land Office, the Director of the Geological Survey, and the solicitor for the department. They will consider the extent of operations which have been prosecuted under outstanding permits to determine whether permittees have acquired equities which should be recognized and to make appropriate recommendations.

"Where permits are now in good standing, either because of recent issue or previous extension of time, no action will be taken during the remaining period covered by the permit. When that time has expired, however, and the permittee has failed to comply with the terms of his permit, he will be called upon immediately to show cause why the permit should not be canceled. This in-
8 cludes so-called group developments heretofore approved and in which extensions have been allowed, where permittees are engaged in joint drilling program, test wells being drilled by a responsible drilling company or some of the public lands in the area covered by the permits. So long as this program is being diligently prosecuted, no adverse action will be taken.

"No leases will be issued for oil and gas production unless required by mandate of law, such as discovery under existing permits, as provided by the mineral leasing act, or through the advertisement of a minimum of 25,000 acres of Osage Indian lands annually as directed by the act of Congress approved March 2, 1929.

"(P. N. 30656.)"

12. Section 32 of the act of February 25, 1920, reads as follows: "SEC. 32. That the Secretary of the Interior is authorized to prescribed necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this act shall be construed or held to affect the rights of the States or other local authority to exercise any right which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property or assest of any lessee of the United States."

13. Your relator avers that under the provisions of the act of February 25, 1920 (41 Stats. 437), hereinabove referred to, the said Ethel M. McLennan was duly qualified under the law to receive the permit for which she applied; that she at all times has stood and now stands in constant readiness, and is in fact ready, able, and willing actually and in all respects of every kind and nature whatsoever fully and completely, to comply with all the regulations made pursuant to the law in respect of duties and obligations of a permittee under the act aforesaid, and petitioner avers that the Secretary of the Interior is without authority of law to reject her application upon any ground, and especially upon the ground alleged that no applications for permits will be allowed after March 12, 1929, because of the adoption of a new policy as set out in said press notices of March 13, 1929, hereinabove quoted and March
9 16, 1929, also identified as Order No. 337; that such notices, orders, and policies are contrary to the act of February 25, 1920, under which petitioner has filed her said application for prospecting permit; that the issuance of a prospecting permit to a qualified applicant is purely a ministerial duty imposed by law upon the Secretary of the Interior; that the only discretion which the law allows the said Secretary of the Interior is embodied in said section 32 of said act of February 25, 1920; that no press notice, policy, order, circular, or regulation of the Secretary of the Interior contrary to the expressed provisions of the act of February 25, 1920, is binding upon your petitioner; that the said Order No. 337 identified as Press Notice of March 16, 1929, upon which was based the rejection of petitioners' application for prospecting permit, is contrary to the said act of February 25, 1920, and particularly to section 1 thereof, which states that deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States ——— shall be subject to disposition in the form and manner provided by this act ——— that the word "authorized" as used in section 13 of said act of February 25, 1920, hereinabove quoted is mandatory and not permissive; that the action of the Secretary of the Interior in denying a permit to the petitioner is arbitrary, confiscatory, retroactive, and illegal.

14. The petitioner, in view of the refusal of the Secretary of the Interior to approve her application, duly and properly made, for an oil and gas permit in respect of the land referred to, is without remedy in the premises, unless a remedy is granted her by this honorable court commanding the Secretary of the Interior to reinstate her application, to approve the same, and issue the permit of which application was made.

Wherefore, the premises considered. Your petitioner prays:
10 1. That a writ of mandamus may be issued, directed to the respondent, Ray Lyman Wilbur, Secretary of the Interior, commanding him to reinstate the application of Ethel M. McLennan, known as oil and gas permit application Sacramento 023466, to approve the same and issue a prospecting permit thereon.

2. That a rule may be issued requiring the respondent, the Secretary of the Interior, to show cause, if any he has, why a writ of mandamus may not be issued as herein prayed.

3. For such other right or rights, relief or order as to the court may seem proper and the nature of the case may require.

ETHEL M. McLENNAN,
Petitioner.

LEWIS EDWIN HOFFMAN, Esq.,
Attorney for Petitioner.

STATE OF CALIFORNIA,
County of Fresno, ss:

Before me, Wm. Lambert, a notary public, within and for Fresno County, California, personally appeared Ethel M. McLennan, who being by me first duly sworn, on oath says that she is the petitioner named in the foregoing petition by her subscribed, and knows the contents thereof; that the statements of facts therein made as upon personal knowledge are true, and those made upon information and belief she believes to be true.

[SEAL.] WM. LAMBERT.

Subscribed and sworn to before me this 27th day of May, 1929. My commission expires October 25, 1932.

11 Sacramento 023466 & 023465. 1337830—1. Report on drawing. Trans. Apps. for O. & G. Pros. permits. CAM

UNITED STATES DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Sacramento, Calif., Nov. 7, 1928.

COMMISSIONER OF THE GENERAL LAND OFFICE,
Washington, D. C.

Sir: Letter "N" of Sept. 24, 1928, canceled oil and gas permit, serial 019789, formerly Visalia 010576, of George Hess, cancellation effective Oct. 29, 1928.

Description of land:

NW. ¼ Sec. 34, T. 26 S., R. 21 E., M. D. M.

Two applications were filed for the land between the hours of 9 a. m. and 10 a. m. on Oct. 29, 1928. Drawing held at 2 p. m. same day.

Successful applicant:

Ethel M. McLennan. Serial 023466. Drew No. 1.

Unsuccessful applicant:

Wilbur O. Retherford. Serial 023465. Drew No. 2.

The applications are transmitted herewith.

Very respectfully,

JOHN C. ENY, *Register.*

12 20 00 1337830—2

Received U. S. land office, Sacramento, Calif. Date, Oct. 29, 1928. Hour, 10 a. m. Sacramento, 023466

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE,
Sacramento, California.

Receipt No. 2939655

Application for prospecting permit (Act of February 25, 1920—Public 146)

To the honorable COMMISSIONER GENERAL LAND OFFICE,
Washington, D. C.

I, Ethel M. McLennan, whose post-office address is Box 157, McKittrick, California, a native-born citizen of the United States of America, and whose husband is a native-born citizen of the United States of America, hereby apply for a permit to prospect for oil and gas upon the NW. ¼ of Section 34, Township 26 South, Range 21 East, M. D. M., containing 160 acres, more or less, as shown by the plat of official survey of said township in the United States land office at Sacramento, California, in which land district said land is situated.

This application is made under the provisions of the act of Congress approved February 25, 1920, entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain."

Said land is not in any known geological structure producing oil or gas, but is believed to offer a favorable field for prospecting for oil and gas because of the geological formation in that vicinity.

In conducting exploratory operations on said land arrangements will be made within the time allowed, after issuance of permit, to erect on said land a drilling outfit of approved type and the work of drilling thereon will be commenced at the earliest date practicable and continued with diligence.

I am filing this application in my own behalf and not in the interest of any other person or persons, association, or corporation.

13 I am not interested directly or indirectly in any permit or lease or in any application for permit or lease under said act except application Sacramento Serial 023224 for the S. ½ SW. ¼, NE. ¼ SW. ¼ Section 1; W. ½ Lot 2 of NE. ¼ and SW. ¼ NE. ¼ of Section 3; NE. ¼ Section 15, Township 25 South, Range 19 East, M. D. M., and also application Sacramento Serial 023386 for the NW. ¼ of Section 22; SW. ¼ Section 26; SE. ¼ Section 28 Township 26 South, Range 21 East, M. D. M., containing 480 acres, more or less, which land is in the same geological structure as the land this date applied for. It is desired that should this application receive No. 1 at the drawing to be held in the United States land office in Sacramento, California, at 2 o'clock p. m. October 29, 1928, the date on which the land applied for will be subject to application, under said act of February 25, 1920, Public 146, amendments thereto

and circulars issued thereunder, that it be considered as an amendment to said application 023386.

As to my reputation and business standing I refer to Arthur Crites, banker, Bakersfield, California; James Ogden, city manager, Bakersfield, California; B. C. Janes, merchant, Bakersfield, California.

A surety bond will be filed herewith when necessary.

ETHEL M. MCLENNAN,
Applicant for Permit.

Subscribed and sworn to before me this 23d day of October, 1928.

H. C. BARTON,
Notary Public in and for the County of Fresno, State of California.

My commission expires September 21, 1930.
Festes 107/108 Nov. 20, 1928. G. H. G.

14 In the Supreme Court of the District of Columbia

THE UNITED STATES OF AMERICA EX RELATIONE Ethel M. McLennan, petitioner *v.* RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR Department, respondent	At law No. 76795

Answer and response to the rule

Filed June 28, 1929

* * * * * * *

Comes now Ray Lyman Wilbur, designated herein as the respondent, and by way of return to the rule to show cause issued herein and for answer to the petitioner says:

1. He admits the allegations of paragraph 1.
2. He admits the allegations of paragraph 2.
3. He admits the allegations of paragraph 3.
4. He admits the allegations of paragraph 4.
5. He admits the allegations of paragraph 5.
6. He admits the allegations of paragraph 6.
7. He admits the allegations of paragraph 7.
8. He admits the allegations of paragraph 8.
9. He admits the allegations of paragraph 9.
10. He admits the allegations of paragraph 10.
11. He admits the release of the press notice contained in paragraph 11, and that same substantially sets forth departmental order 337 of March 26, 1929.
12. He admits the provisions of section 32 of the act of February 25, 1920.

15 13. He denies all of the allegations of section 13 of the petition except such as are contained in the first seven lines thereof to and including the words "obligations of a permittee under the act aforesaid" in the eighth line, which he admits.

14. He denies the allegations of paragraph 14.

15. Further answering, respondent alleges that the administration of the act of February 25, 1920 (41 Stat. 437, sec. 32), is reposed in

the Secretary of the Interior with whose authority, reasonably exercised, the courts may not interfere unless the Secretary fails, refuses, or neglects to perform a mandatory, ministerial duty imposed by the terms of the act.

16. Further answering, respondent alleges that the language of section 13 of the act is permissive, not mandatory and has been so construed and acted upon by the Secretary of the Interior during the nine years intervening since the date of its passage:

SEC. 13. That the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land wherein such deposits belong to the United State and are not within any known geological structure of a producing oil or gas field upon condition that the permittee shall begin drilling operations within six months from the date of the permit, and shall, within one year from and after the date of permit, drill one or more wells for oil or gas to a depth of not less than five hundred feet each, unless valuable deposits of oil or gas shall be sooner discovered, and shall, within two years from date of the permit, drill for oil or gas to an aggregate depth of not less than two thousand feet unless valuable deposits of oil or gas shall be sooner discovered. The Secretary of the Interior may, if he shall find that the permittee has been unable with the exercise of diligence to test the land in the time granted by the permit, extend any such permit for such time, not exceeding two years, and upon such conditions as he shall prescribe. Whether the lands sought in any such application and permit are surveyed or unsurveyed the applicant shall, prior to filing his application for permit, locate such lands in a reasonably compact form and according to the legal subdivisions of the public land surveys if the land be surveyed; and in an approximately square or rectangular tract if the land be an unsurveyed tract, the length of which shall not exceed two and one-half times its width, and if he shall cause to be erected upon the land for which a permit is sought a monument not less than four feet high, at some conspicuous place thereon, and shall post a notice in writing on or near said monument, stating that an application for permit will be made within thirty days after date of posting said notice, the name of the applicant, the date of the notice, and such a general description
16 of the land to be covered by such permit by reference to courses and distances from such monument and such other natural objects and permanent monuments as will reasonably identify the land, stating the amount thereof in acres, he shall during the period of thirty days following such marking and posting, be entitled to a preference right over others to a permit for the land so identified. The applicant shall, within ninety days after receiving a permit, mark each of the corners of the tract described in the permit upon the ground with substantial monuments, so that the boundaries can be readily traced on the ground, and shall post in a conspicuous place upon the lands a notice that such permit has been granted and a description of the lands covered thereby: *Provided*, That in the Territory of Alaska prospecting permits not more than five in number may be granted to any qualified applicant for periods not exceeding

four years, actual drilling operations shall begin within two years from date of permit, and oil and gas wells shall be drilled to a depth of not less than five hundred feet, unless valuable deposits of oil or gas shall be sooner discovered, within three years from date of the permit and to an aggregate depth of not less than two thousand feet unless valuable deposits of oil or gas shall be sooner discovered, within four years from date of permit: *Provided further*, That in said Territory the applicant shall have a preference right over others to a permit for land identified by temporary monuments and notice posted on or near the same for six months following such marking and posting, and upon receiving a permit he shall mark the corners of the tract described in the permit upon the ground with substantial monuments within one year after receiving such permit."

This language plainly reposes in the Secretary of the Interior the discretion either to issue or decline to issue prospecting permits. Neither section 13 nor any other section, nor any rule or regulation promulgated in the administration of the act, vests any right in an applicant for a permit, to receive the same. On the contrary, section 2 of the regulations issued March 11, 1920, by the Secretary of the Interior under said act of February 25, 1920, reprinted and reissued by the Secretary of the Interior October 29, 1920, in force at date of petitioner's application, and still in force, expressly provides:

"It should be understood that under the act, the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety as the facts may be deemed to warrant."

The securing of a permit or license to prospect public lands for oil and gas is a privilege and not a right. Petitioner does not allege that she had performed any work or expended any
17 money or other thing of value in, upon or for the development of the land described in the application, nor that she had surrendered to the United States any claim, right, or interest in this or other lands of the United States which would constitute a legal or equitable claim or right to receive the permit applied for; neither does she disclose that any right, of whatsoever nature, has been acquired by her to receive a permit, but she simply sets forth a state of facts which indicate that she has qualified as an applicant and thus placed herself in a position to receive a permit if and when issued by the Secretary of the Interior. Further than that, she shows no acquired status involving fixed or vested rights to enter public land of the United States. The petition therefore states no ground upon which the court will be justified in issuing the writ sought, commanding him either—

(*a*) To reinstate petitioner's application;
(*b*) To approve same; or
(*c*) To issue a prospecting permit to petitioner.

Wherefore respondent prays that the rule be discharged, the petition dismissed, and that petitioner take nothing herein; that respondent be permitted to go hence without day, with his costs.

RAY LYMAN WILBUR,
By JOS. M. DIXON,
Acting Secretary of the Interior.

18 DISTRICT OF COLUMBIA, *ss:*

Joseph M. Dixon, being first duly sworn on his oath, says that he has read the foregoing answer by him subscribed, and that he knows the contents thereof, and that the matters therein stated of his own knowledge are true, and those stated upon information and belief he believes to be true.

JOS. M. DIXON,
Acting Secretary of the Interior.

Subscribed and sworn to before me this 27th day of June, 1929.

[SEAL.] WILLIAM H. REICHARD,
Notary Public.

Commission expires August 7, 1929.

19 Supreme Court of the District of Columbia

WEDNESDAY, *April 16, 1930.*

Session resumed pursuant to adjournment, Hon F. L. Siddons, justice presiding.

* * * * * * *

Come now here as well the relator, as the respondent, by their respective attorneys, and the said cause having come on for hearing upon the answer to the rule to show cause herein on the 28th day of February, 1930, whereupon, it having been agreed upon by counsel for the respective parties that the cause should come before the court as upon final hearing upon bill and answer, the court finds that the writ of mandamus should issue as prayed. Whereupon, the court being fully advised, and counsel having been fully heard for the respective parties, it is considered, ordered, and adjudged this 16th day of April, 1930, that the respondent, Ray Lyman Wilbur, be, and he is hereby commanded, within twenty days after this date to reinstate the application of Ethel M. McLennan, for prospecting permit filed under section 13 of the act of February 25, 1920 (41 Stat. 437), and proceed therewith according to law.

From the foregoing order and judgment the respondent in open court notes an appeal to the Court of Appeals this 16th day of April, 1930; the same is allowed by the court.

20 In the Supreme Court of the District of Columbia

THE UNITED STATES OF AMERICA, EX REL, ETHEL M. McLENNON, petitioner *v.* RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, respondent	At law No. 76,795.

Assignment of errors

Filed May 2, 1930

* * * * * * *

The respondent presents his assignment of errors as follows:

1. The court erred in finding for the petitioner and against the respondent and in granting the writ of mandamus herein.

2. The court erred in holding that the acts of the President of the United States and of the Secretary of the Interior in the premises, together, or separately, do not constitute a temporary executive withdrawal of the public lands subject to prospecting for oil and gas under the provisions of the act of February 25, 1920, commonly called the oil leasing act, from the purposes of said act.

3. The court erred in holding that the oil leasing act does not repose in the Secretary of the Interior a discretion broad enough to permit him, in the exercise of his official judgment, to refuse to issue permits to any applicant.

4. The court erred in holding that the oil leasing act does not repose in the Secretary of the Interior a discretion broad enough to permit him, in the exercise of his official judgment, to refuse to issue permits to any applicant in the absence of specific rules and regulations.

21 5. The court erred in holding that the provisions of the last subdivision of Rule 2 of the rules and regulations do not vest in the Secretary of the Interior discretion to refuse to grant any permit in the due exercise of his official duty.

O. H. GRAVES,
Attorney for Respondent.

22 In the Supreme Court of the District of Columbia

THE UNITED STATES OF AMERICA, EX REL, ETHEL M. McLENNON, petitioner
v.
RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, respondent
} At law No. 76,795

Designation of record

Filed May 2, 1930

The clerk in making up the transcript of record on appeal in the above-entitled cause, will include:

1. Petition and exhibits.
2. Answer and exhibits.
3. Opinion and judgment of the court.
4. Notation and allowing of appeal.
5. Assignment of errors.
6. This designation.

O. H. GRAVES,
Attorney for Respondent.

Service acknowledged this 22d day of April, 1930.

LEWIS E. HOFFMAN,
Attorney for Petitioner.

23 Supreme Court of the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered

from 1 to 22, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 76795 at law, wherein the United States of America, *ex relatione* Ethel M. McLennan is petitioner and Ray Lyman Wilbur, Secretary of the Interior, is respondent, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 21st day of June, 1930.

[SEAL.] FRANK E. CUNNINGHAM, *Clerk.*

(Indorsement on cover): District of Columbia Supreme Court. No. 5247. Ray Lyman Wilbur, Secretary, &c., appellant, *vs.* The United States of America, ex relatione Ethel M. McLennan. Court of Appeals, District of Columbia. Filed June 24, 1930. Henry W. Hodges, clerk.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Monday, October 6th, A. D. 1930.

* * * * * * *

No. 5247

RAY LYMAN WILBUR, Secretary of the Interior, Appellant,

vs.

U. S. ex Rel. ETHEL M. McLENNAN

On motion of Mr. Chester I. Long for leave to file brief and make oral argument as amicus curiæ, on behalf of the State of Colorado, in the above entitled cause, it is ordered by the Court that said motion be and it is hereby granted.

* * * * * * *

Tuesday, October 14th, A. D. 1930.

* * * * * * *

No. 5241

RAY LYMAN WILBUR, Secretary of the Department of the Interior, Appellant,

v.

UNITED STATES OF AMERICA ex Relatione ROY G. BARTON

No. 5247

RAY LYMAN WILBUR, Secretary of the Interior Department, Appellant,

v.

THE UNITED STATES OF AMERICA ex Relatione ETHEL McLENNAN

No. 5250

RAY LYMAN WILBUR, Secretary of the Interior, and C. C. Moore, Commissioner of the General Land Office, Appellants,

v.

W. B. PYBON

And No. 5251

RAY LYMAN WILBUR, Secretary of the Interior, and Charles C. Moore, Commissioner of the General Land Office, Appellants,

v.

UNITED STATES OF AMERICA ex Rel. H. H. SIMPSON

On motion, William O. Wilson, Esq., is allowed to file brief and take part in oral argument in No. 5247, as amicus curiæ, on behalf of the State of Wyoming.

On motion, P. Q. Nyce, Esq., is allowed to file brief and take part in oral argument in No. 5247, as amicus curiæ, on behalf of Utah, New Mexico and Montana.

The argument in the above entitled causes was commenced by Mr. O. H. Graves, attorney for the appellants, and was continued by Mr. E. C. Finney, attorney for the appellants.

* * * * * * *

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

Wednesday, October 15th, A. D. 1930.

* * * * * * *

No. 5241

RAY LYMAN WILBUR, Secretary of the Department of the Interior, Appellant,

v.

UNITED STATES OF AMERICA ex Relatione ROY G. BARTON

No. 5247

RAY LYMAN WILBUR, Secretary of the Interior Department, Appellant,

v.

THE UNITED STATES OF AMERICA ex Relatione ETHEL McLENNAN

No. 5250

RAY LYMAN WILBUR, Secretary of the Interior, and C. C. Moore, Commissioner of the General Land Office, Appellants,

v.

W. B. PYBON

And No. 5251

RAY LYMAN WILBUR, Secretary of the Interior, and Charles C. Moore, Commissioner of the General Land Office, Appellants,

v.

UNITED STATES OF AMERICA ex Rel. H. H. SIMPSON

The argument in the above entitled causes was continued by Mr. James Conlon, attorney for the appellant in No. 5241, and by Mr. Lewis E. Hoffman, attorney for the appellant in No. 5247, and by Mr. James G. Leovy, attorney for the appellant in No. 5250, and by William O. Wilson, Esq., Attorney General of the State of Wyoming, as amicus curiæ, and by Mr. Peter Q. Nyce, as amicus curiæ, on behalf of New Mexico, Utah and Montana, and by Mr. Chester I. Long, as amicus curiæ, on behalf of the State of Colorado, and was concluded by Mr. E. C. Finney, attorney for the appellants.

* * * * * * *

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5247

RAY LYMAN WILBUR, Secretary of the Interior, Appellant,

v.

THE UNITED STATES OF AMERICA ex Relatione ETHEL McLENNAN

And No. 5250

RAY LYMAN WILBUR, Secretary of the Interior, and C. C. Moore, Commissioner of the General Land Office, Appellants,

v.

W. B. PYBON

And No. 5251

RAY LYMAN WILBUR, Secretary of the Interior, and Charles C. Moore, Commissioner of the General Land Office, Appellants,

v.

UNITED STATES OF AMERICA ex Rel. H. H. SIMPSON

(Before Martin, Chief Justice, and Robb and Van Orsdel, Associate Justices)

These cases were argued and presented with No. 5241, Wilbur v. Barton, just decided, and the decision in that case is controlling here.

The judgment in each case will be reversed, and the cause remanded.

Reversed.

Chas. H. Robb, Associate Justice.

For reasons stated in his dissenting opinion in No. 5241, Wilbur v. Barton, Mr. Justice Van Orsdel dissents.

Endorsed: Nos. 5247, 5250, 5251. Ray Lyman Wilbur, Secretary of the Interior, Appellant, v. United States of America ex relatione Ethel M. McLennan; Ray Lyman Wilbur, Secretary of the Interior, et al., Appellants, v. W. B. Pyron; Ray Lyman Wilbur, Secretary of the Interior, et al., Appellants, v. United States of America ex rel. H. H. Simpson. Opinion of the Court per Mr. Justice Robb. Court of Appeals, District of Columbia. Filed December 1, 1930. Henry W. Hodges, Clerk.

Monday, December 1st, A. D. 1930.

* * * * * * *

No. 5247, October Term, 1930

RAY LYMAN WILBUR, Secretary of the Interior Department, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione ETHEL M. McLENNAN

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia

and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court.

Per Mr. Justice Robb, December 1, 1930.

Mr. Justice Van Orsdel dissenting.

* * * * * * *

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5241

RAY LYMAN WILBUR, Secretary of the Interior, Appellant,

v.

UNITED STATES OF AMERICA ex Rel. ROY G. BARTON

(Before Martin, Chief Justice, and Robb and Van Orsdel, Associate Justices)

Appeal from a Judgment in the Supreme Court of the District directing the issuance of a writ of mandamus to compel the Secretary of the Interior "to reinstate the application of the petitioner, Roy G. Barton, * * * and to proceed thereon according to law."

Should the judgment be affirmed, it probably would result in the reinstatement of "more than 5,000 applications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the field offices."

The cause was heard on petition and answer. There is no dispute as to the facts, which are substantially as follows: On June 6, 1928, Barton filed an application in the Land Office at Las Cruces, New Mexico, for a permit to prospect for oil and gas in a certain described tract of public land of the United States (Act of February 25, 1920; 41 Stat. 437).

On March 13, 1929, the Department of the Interior released a "Memorandum for the Press," reading in part as follows: "Secretary Wilbur, of the Department of the Interior, to-day asked the Commissioner of the General Land Office to send instructions to all local land offices to the effect that they are not to receive further applications for permits to prospect for oil and gas on the public domain, and to reject all applications now pending. These instructions are in accordance with the statement issued at the White House yesterday to the effect that 'there will be complete conservation of Government oil in this administration.'"

On the same day a telegram was forwarded by the Department to the various United States land offices, including the land office at Las Cruces, New Mexico, reading in part as follows:

"No oil and gas prospecting permits will be issued on and after March 12, 1929. Reject all applications for oil and gas permits now pending in your office and receive no more. All orders for drawings hereby revoked."

On March 16, 1929, Departmental Order No. 337 was issued, reading in part as follows:

"The Federal oil conservation policy announced by President Hoover will be energetically executed by the Interior Department. There are more than 5,000 applications for oil and gas permits on public lands pending in the General Land Office in Washington and an unknown number in the field offices. Steps were taken several days ago toward the rejection of all such applications, and registers of local land offices have been instructed not to receive new applications. Probably in none of the cases on hand has the applicant expended money for development purposes, although he may have gone to some expense in opposing conflicting claims or furnishing additional evidence in support of his application. * * * To determine the facts in connection with existing oil and gas permits, I have named a committee consisting of the Commissioner of the General Land Office, the Director of the Geological Survey, and the solicitor of the department. They will consider the extent of operations which have been prosecuted under outstanding permits to determine whether permittees have acquired equities which should be recognized and to make appropriate

recommendations. Where permits are now in good standing, either because of recent issue or previous extension of time, no action will be taken during the remaining period covered by the permit. When that time has expired, however, and the permittee has failed to comply with the terms of his permit, he will be called upon immediately to show cause why the permit should not be canceled. * * * No leases will be issued for oil and gas production unless required by mandate of law, such as discovery under existing permits, as provided by the mineral leasing act, or through the advertisement of a minimum of 25,000 acres of Osage Indian lands annually, as directed by the act of Congress approved March 2, 1929."

This Order also was incorporated in a "Memorandum for the Press" issued by the Department on the same day.

On March 26, 1929, the Commissioner of the General Land Office, "pursuant to instructions approved by the Secretary of the Interior March 13, 1929, and in accordance with the policy announced in Departmental Order No. 337 of March 16, 1929, rejected" Barton's application. An appeal was taken, and the order of rejection was sustained by the Department in a decision dated September 4, 1929.

In his petition Barton avers "that there is nothing in or under the provisions of the act of February 25, 1920 (41 Stat. 437), * * * which requires your relator to make any substantial expenditures for reliable geological surveys upon the lands embraced in his oil and gas application * * * in order to entitle him to a permit for the lands described in said application;" and that "the Secretary of the Interior is without authority of law to reject his application upon any ground, and especially upon the ground alleged that no applications for permits will be allowed after March 12, 1929, because of the adoption of a new policy as set out in said press notices of March 13, 1929, hereinabove quoted, and March 16, 1929, also identified as Departmental Order No. 337."

The answer admits, for the purposes of this suit, that Barton "was duly qualified under the law to receive the permit for which he applied; that at all times relator (Barton) was and is now ready, able, and willing to comply with all regulations made pursuant to the said act of Congress respecting the duties and obligations of permittee."

Did the orders of the Secretary of the Interior amount to a temporary withdrawal of the public land from location, entry, and exploration for the purpose of discovering oil or gas; and, assuming the withdrawal, did the mere filing of an application for a prospecting permit initiate a right in the applicant that could not be affected by the withdrawal?

The Act of June 25, 1910 (36 Stat. 847), "to authorize the President of the United States to make withdrawals of public lands in certain cases," reads in part as follows:

"Be it enacted * * *, That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."

Prior to 1910 the President had acted in scores of cases without express statutory authority, and in United States v. Midwest Oil Co., 236 U. S. 459, his authority to make such withdrawals was expressly sustained.

There can be no doubt that the effect of the orders issued by the Secretary was to withdraw from further location, entry, and exploration for the discovery of oil and gas all public land, and that the purpose of such withdrawal was to meet conditions due to great overproduction and to conserve oil and gas in the public interest. That such was the intent of the Secretary and the understanding of the public is equally plain. It is immaterial that the orders were not limited as to time, for the Act of 1910 provides that such withdrawals or reservations shall remain in force until revoked by the President or by an Act of Congress.

The next question to be determined is whether the withdrawal of the Secretary was the withdrawal of the President. It is settled law that "the President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties" (Wilcox v. Jackson, 13 Pet. 498), and that "the acts of the heads of departments, within the scope of their powers, are in

law the acts of the President" (Wolsey v. Chapman, 101 U. S. 755, 769). In the case last mentioned it was held that the order of the Secretary of the Interior, directing that the lands on the Des Moines River above the Raccoon Fork be reserved from sale, was in contemplation of law the order of the President and had the same effect as the proclamation mentioned in the Act of September 4, 1841 (5 Stat. 453). The Court said:

"A proclamation by the President, reserving lands from sale, is his official public announcement of an order to that effect. No particular form of such an announcement is necessary. It is sufficient if it has such publicity as accomplishes the end to be attained. If the President himself had signed the order in this case, and sent it to the registers and receivers who were to act under it, as notice to them of what they were to do in respect to the sales of the public lands, we can not doubt that the lands would have been reserved by proclamation within the meaning of the statute. Such being the case, it follows necessarily from the decision in Wilcox v. Jackson that such an order sent out from the appropriate executive department in the regular course of business is the legal equivalent of the President's own order to the same effect. It was, therefore, as we think, such a proclamation by the President reserving the lands from sale as was contemplated by the act."

See also United States v. Morrison, 240 U. S. 192; Northern Pacific Railway Co. v. Wismer, 246 U. S. 283; Relation of the President to the Executive Departments, 7 Op. Atty. Gen. 453.

In the present case the orders of the Secretary gave effect to the previously announced policy of the President, were acquiesced in by him, and were in legal contemplation his acts. Was the President vested with such authority?

It is not contended that the Act of June 25, 1910 (36 Stat. 847), expressly authorizing the President to make temporary withdrawal "from settlement, location, sale, or entry any of the public lands of the United States", has been repealed. The contention is that the Act of February 25, 1920 (41 Stat. 437), "to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain", and providing that public lands containing deposits of such

minerals "shall be subject to disposition in the form and manner provided by this Act", was mandatory, and that the President was without power to withdraw such lands from disposition as provided in the Act. Sec. 13 of that Act, relating to oil and gas, provides in part "that the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land * * *. Whether the lands sought in any such application and permit are surveyed or unsurveyed the applicant shall, prior to filing his application for permit, locate such lands in a reasonably compact form and according to the legal subdivisions of the public land surveys if the land be surveyed; * * *".

Sec. 14 provides in part that "upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil or gas have been discovered within the limits of the land embraced in any permit, the permittee shall be entitled to a lease for one-fourth of the land embraced in the prospecting permit: * * *."

There is no provision in the Act purportin to repeal or modify the Act of 1910, and in our view such a modification may not be implied. The provision in the first section that the lands containing certain named mineral deposits "shall be subject to disposition in the form and manner provided by this Act" is general, and no more mandatory than was the provision in the Act of 1872 (17 Stat. 91, R. S. 2319, 2329) declaring all public lands containing petroleum or other mineral oils to be "free and open to occupation, exploration and purchase by citizens of the United States * * * under regulations prescribed by law"; and yet the President withdrew without direct congressional authority such public lands, and his action was sustained in the Midwest case (236 U. S. 459). But it is insisted that the Act of 1910 only authorizes the temporary withdrawal by the President of public lands "from settlement, location, sale, or entry", and that the application for permit and the lease which may follow discovery of oil under the Act of 1920 are not embraced within those terms. It is apparent, we think, that the Act of 1910 was intended to be of wide scope and recognized the author-

ity of the President temporarily to prevent the alienation of public lands or any interest therein adverse to the United States.

In Mason v. United States, 260 U. S. 545, by Executive order dated December 15, 1908, lands had been "withdrawn from settlement and entry, or other form of appropriation." It was contended that this order did not include appropriations by mining locations. The Court observed:

"The words 'settlement and entry', it is said, apply only to the act of settling upon the soil and making entry at a land office, as, for example, under the homestead laws; that mining lands are acquired, not by settlement or entry, but by location and development; that *that* this process is not covered by the words 'other form of appropriation', limited, as they must be, by the associated specific words, to those forms of appropriation which are akin to a settlement and entry. * * * *If the appropriation of mineral lands by location and development be not akin to settlement and entry, what other form of appropriation can be so characterized?* (Italics ours.) None has been suggested and we can think of none. * * * Moreover, the circumstances leading up to and accompanying the issuance of the order demonstrate conclusively that its main, if not its only, purpose was to preserve from private appropriation the oil and gas which the lands were thought to contain pending investigation and congressional action, and this purpose would have been subverted by appropriations of the nature here involved quite as much as by other forms. We conclude, therefore, that the mining locations here relied upon fell clearly within the withdrawal order and consequently were prohibited by it."

Under the Act of 1920, the applicant for a permit was required to locate and designate the lands sought in his application. The issuance of a permit and the discovery of "valuable deposits of oil or gas" entitled him to a lease—an interest in the land. This, we think, was akin to location or entry, as used in the Act of 1910.

If, as suggested by counsel for appellee, the Act of 1910 has no application, then it well might be held that an implied power to withdraw was reposed in the President under the Act of 1920. United States v. Midwest Oil Co., 236 U. S. 459.

Under the general mining laws a citizen was free to go upon the public domain. He did the work necessary to discover minerals, staked his claim, recorded notice in the mining district or county records, and his rights became fixed. Forbes v. Gracey, 94 U. S. 762; Belk v. Meagher, 104 U. S. 279. This was true as to public lands containing oil and gas until the Act of February 25, 1920 (41 Stat. 437). Under the provisions of that Act, as already appears, a citizen no longer has a right to go upon public lands of the United States to prospect for oil or gas, unless permitted to do so by the Secretary of the Interior, under such "proper rules and regulations as he may prescribe" (Sec. 13). It is at once apparent that there is a marked distinction between the old law and the new. Under the old law a citizen was free to make explorations as a matter of right. Under the new law he must apply for the privilege. Until that privilege is granted, through the issuance of a permit, he has no vested interest. It is apparent, we think, that Congress recognized the distinction between the old law and the new and that the President might at any time, if conditions changed, withdraw the public lands from exploration. Under Sec. 13 the Secretary is "authorized" to grant prospecting permits. Under Sec. 14, if a permit has been granted and the permittee has incurred the expense incident to the exploration and discovery of "valuable deposits of oil or gas", he "shall be entitled to a lease." Thus Congress recognized that the mere filing of an application for a permit confers no vested right upon the applicant, but that if a permit be issued and he goes on the land and makes a discovery he has such an interest as must be recognized.

Congress, of course, knew that, if changed conditions rendered advisable the temporary withdrawal by the Executive of the public lands from further exploration, thousands of such applications for permits might be pending. It was careful, therefore, to distinguish between an application for a permit, and the rights that might be acquired under an issued permit. Every applicant for a permit was charged with knowledge that the Executive might temporarily withdraw the lands from further exploration, and that his application was, therefore, subject to such authority of the Executive. We rule that the order of the Secre-

tary rejecting Barton's application for a permit was a valid exercise of power by the Executive.

Mandamus is awarded, not as a matter of right, but in the exercise of a sound judicial discretion, to remedy and not to promote a wrong, to compel the performance of an actual duty rather than to direct the performance of an act which will work public or private mischief. While classed as a legal remedy, its issuance is largely governed and controlled by equitable principles. Duncan Townsite Co. v. Lane, 245 U. S. 308; Arant v. Lane, 249 U. S. 367; Ex Parte Skinner & Eddy Corp., 265 U. S. 86; Work v. Rives, 267 U. S. 175; Payne v. United States, 50 App. D. C. 119, 269 F. 198; Morgan v. Howard, 54 App. D. C. 3, 293 F. 650; Stowell v. Deming, 57 App. D. C. 223, 19 F. (2d) 697. In the exercise of a sound judicial discretion, the court must be controlled by settled legal principles.

As observed in the Midwest case (236 U. S. 471):

"The President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location; his action inflicted no wrong upon any private citizen, and being subject to disaffirmance by Congress, could occasion no harm to the interest of the public at large."

In the present case, his orders, issued through the Secretary, were intended to meet an emergency occasioned by the great over-production of oil and gas, the waste incident thereto, and other public considerations. There was available to him the advice of the Attorney General on all questions of law that might be involved. It was necessary to interpret the applicable statutes, and we have expressed the view that they were correctly interpreted; but, in any event, it would require a very clear case to justify a court in arresting and suspending the action of the Executive taken in the public interest. The record does not present such a case.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Chas. H. Robb, Associate Justice.

Endorsed: No. 5241. Ray Lyman Wilbur, Secretary of the Department of the Interior, Appellant, v. United States

of America ex relatione Roy G. Barton. Opinion of the Court per Mr. Justice Robb. Court of Appeals. District of Columbia. Filed December 1, 1930. Henry W. Hodges, Clerk.

Number 5241

Mr. Justice VAN ORSDEL, dissenting:

I am compelled to dissent from the opinion and judgment of my associates.

It is conceded that the applicant Barton possessed all the qualifications necessary under the Leasing Act to entitle him to a permit. In other words, but for the order of the Secretary suspending the operation of the Leasing Act, he would have been compelled to grant Barton's application. We start, therefore, with an applicant entitled to a permit at the time the order was made suspending the provisions of the Leasing Act.

The Act of 1910, vesting authority in the President to withdraw public lands from "settlement, location, sale, or entry", specifically provides the terms upon which this Executive authority may be exercised. It must be done by a formal proclamation, which the Secretary of the Interior is required, by the terms of the Act, to report to Congress at the next regular session after the date of withdrawal. Prior to the enactment of this statute, lands had been withdrawn by proclamation of the President without any particular authority of statute. Congress, therefore, in the 1910 Act, manifested a clear intention to keep control of the withdrawals of public lands to the extent of specifying the manner and terms under which they could be withdrawn by the President, and in addition requiring notice to be given it of such withdrawals by the Secretary of the Interior in order that the action of the President, if deemed advisable, might be promptly revoked.

This brings us to what was done in this case. No proclamation, formal or otherwise, was ever issued by the President, and no notice of any proclamation was given Congress by the Secretary, as required by the 1910 Act. The order of the Secretary, telegraphed the local land

officers, was based upon the following newspaper report under date of March 12, 1929, purporting to express the views of the President:

"There will be no leases or disposal of government oil lands, no matter what category they may lie in, of government holdings or government controls, except those which may be mandatory by Congress. In other words, there will be complete conservation of government oil in this administration."

It will be observed that this merely purports to state a future policy which the President might or might not adopt in respect to government oil lands. It was not transmitted by the President to the Secretary of the Interior. The information upon which he based his order was obtained exclusively through the press. The press report merely referred to a declaration said to have been made by the President, which he could only make effective by a formal proclamation. There was, therefore, no proclamation whatever under the terms of the 1910 Act which would justify in the remotest degree the action taken by the Secretary of the Interior.

Neither can the action of the Secretary be upheld under the doctrine of acquiescence. It is undoubtedly true that "the acts of the heads of departments, within the scope of their powers, are in law the acts of the President". The President is the head of the Executive Department of the government, and the lawful acts of his subordinates will be presumed to be his acts, but this presumption does not extend to unlawful acts of subordinates. The difficulty here is that the Secretary acted without the scope of his power in the suspension of the oil leasing act. He was totally without power to act until certain statutory conditions had been complied with; namely, the issue of a proclamation by the President.

The cases relied upon in the majority opinion are not in point. In Wilcox vs. Jackson, 13 Pet. 498, a preemption entry had been made upon land set aside and occupied for more than twenty years as a military reservation, on which the government had expended large sums of money under the direction of the Secretary of War. Of course, a long

continued use of public land by the government itself for military purposes, or for other purposes, would constitute an occupancy by the government on its own land, amounting to a withdrawal of the land from entry and settlement; and, whether done by direct authority of the President or by the lawful act of the Secretary of War, the President, after this long lapse of time, would be assumed to have acquiesced in the withdrawal and occupation of the land.

The case of Wolsey vs. Chapman, 101 U. S. 755, has even less application to the present case than does the Wilcox case. Here, a large tract of land had been granted to the Territory of Iowa for the development of navigation on the Des Moines river. The execution of the Act was delegated to the Secretary of the Interior, and was accordingly within the lawful scope of the authority vested in him. A controversy arose as to the limits of the land granted—whether it extended beyond a point in the river known as Raccoon Fork. The matter required determination from many angles by the Department of the Interior, and, to protect the interests of all concerned, the Secretary suspended settlement on the lands in question until the matter could be legally determined. It was said, and properly so, that the act of the Department, being within the scope of its powers, would be regarded in law as the act of the President. The difference between that case and the one at bar is that here there is only one law under which a withdrawal such as we are here considering can be made; namely, through the Proclamation Act of 1910. This act is a specific grant of power by Congress to the President by which he may in his discretion withdraw public lands from entry, sale, or settlement. Being a grant of power belonging to Congress, it should strictly be complied with, and the courts will not imply compliance from circumstances such as those involved in this case.

The case of United States vs. Midwest Oil Company, 236 U. S. 459, has little or no analogy to this case. There, the proclamation of the President, issued before the enactment of the 1910 statute, hence without specific statutory authority, described accurately the territory withdrawn, the character of the land, and the object of withdrawal. The President, doubtful of his authority in the premises, submitted

the whole matter to Congress for its approval. It resulted in the prompt enactment of the 1910 statute. The proclamation was prepared with all the formalities and dignity of a document promulgated by the President with a view to affecting great public and private interests. In that case the oil company entered upon the lands after the proclamation was issued. The court, in its opinion, strongly implied that if the entry upon the lands had been made prior to the issuance of the proclamation by the President, it would have had a different case. Here the application was filed prior to the order of the Secretary, and here there was no proclamation whatever as required by statute.

It is not true that the applicant was required to do nothing on the land before filing his application for a permit. He was required by the Leasing Act to seek out the location, to post notices, giving a description of the land for which application would be made,—if surveyed land by the lines of survey; if unsurveyed, by descriptive metes and bounds. This constituted an entry upon the land, which developed into a right with the filing of the application of which the applicant cannot be divested by any act of the Executive Department. This is settled law by numerous decisions of the Supreme Court as to entry upon public lands, such as homestead, preemption, etc. Entry upon oil lands is in every respect entitled to the same legal significance as entry upon lands for the purpose of acquiring title. In Mason v. United States, 260 U. S. 545, it was contended that the words "settlement and entry" applied only to the act of settling upon the soil and making entry in the land office, and that it did not apply to mining lands which it was contended were not acquired by settlement and entry but by location and development, but the court said:

"If the appropriation of mineral lands by location and development be not akin to settlement and entry, what other form of appropriation can be so characterized? None has been suggested and we can think of none."

This is not an action to mandamus the President. The writ runs against the Secretary of the Interior and the Commissioner of the General Land Office. The President, so far as I am able to observe, has had nothing to do with this case. The case grew out of orders originated in the Land Department, based upon newspaper rumor; and the

action here is to compel the Secretary of the Interior and the Commissioner of the General Land Office to perform purely administrative duties imposed upon them by law. That mandamus will lie for this purpose is too elementary to require citation of authority. While the judgment is to require a departmental officer to perform a purely administrative duty imposed by Congress, the court has no power under the sanction of "judicial discretion" to withhold its mandate, even though, in its judgment, to compel the enforcement might not be in the public interest. The policy of the law belongs to the legislative and not the judicial department of the government.

The court is called upon here to determine purely questions of law, and it is immaterial whether one, or five-thousand, or ten-thousand applicants would be affected by the court's decision. Neither, in the agitated state of the public mind, should the fact that this is an "Oil Case" entitle it to any particular sanctity in the eyes of the law, or furnish adequate ground for the wholesale slaughter of private property rights by judicial decree. The present inquiry is limited to determining the important questions of law here involved. It would seem, therefore, unnecessary to consider the facts stressed in the majority opinion "that the purpose of such withdrawal was to meet conditions due to great overproduction and to conserve oil and gas in the public interest"; or that, if the judgment be affirmed in this case, "it would probably result in the reinstatement of 'more than five-thousand applications for oil and gas permits on the public lands pending in the Land Office in Washington, and an unknown number in the field offices' ".

These might furnish commendable reasons for a proper and lawful withdrawal of the lands either by formal proclamation of the President or by Act of Congress, but we have hardly reached the period where the laws of the land can be suspended or repealed by the arbitrary methods here employed.

For the reasons stated, the judgment should be affirmed.

Josiah A. Van Orsdel, Associate Justice.

Endorsed: No. 5241. Ray Lyman Wilbur, Secretary of the Interior, Appellant, v. United States of America ex rel. Roy G. Barton. Dissenting Opinion per Mr. Justice Van Orsdel. Court of Appeals. District of Columbia. Filed December 1, 1930. Henry W. Hodges, Clerk.

Memorandum opinion by Mr. Justice Siddons, of the Supreme Court of the District of Columbia, as it appears in the printed record in case No. 5250 in the Court of Appeals of said District, entitled Ray Lyman Wilbur, Secretary of the Interior, and C. C. Moore, Commissioner of the General Land Office, appellants, vs. W. B. Pyron, which opinion is included in this transcript by designation of counsel

MEMORANDUM ON SUBMISSION AFTER FINAL HEARING—Filed Apr. 15, 1930

* * * * * * *

The above-entitled case, together with the cases of McLennan *v.* Wilbur, No. 76795; Retherford *v.* Wilbur, No. 76911 and Paris *v.* Wilbur, No. 77213 were submitted for final hearing. A waiver of a jury trial has been filed and the oral testimony of one witness has been heard in the instant case. In the three other cases referred to no issues of fact are involved.

These four cases present the same question and it is primarily a question of law. Similar cases involving the same question had previously been heard and submitted to Mr. Justice Bailey, and on April 8th, last, he filed an opinion in the two cases submitted to him, in which he held that the writ of mandamus should issue directing the Secretary of the Interior to reinstate the applications of the relators and to proceed therewith according to law. In that opinion the writer of the present memorandum concurs, both in its reasoning and in the conclusions reached by the learned justice.

This memorandum is to be taken as applying to all of the four cases submitted to him as stated above. The writer desires now in a few sentences, to emphasize certain phases of the matter.

The act of Congress, which is invoked by the relators in the pending cases, was approved February 25, 1920, and, as pointed out by Justice Bailey in his opinion, the act is entitled "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain." We are only concerned now with those provisions of the act which deal with oil and gas permits.

The act authorizes the Secretary of the Interior to promulgate necessary and proper rules and regulations to gov-

ern in the execution of the statute. (Section 32.) Pursuant thereto the Secretary promulgated oil and gas regulations under date of March 11, 1920. These regulations occupy some twenty-five printed pages, and there has also been published by the Secretary, in the form of an appendix to his regulations, a digest of opinions and decisions in connection with the administration of the act of Congress mentioned, as applied to oil and gas. This appendix was approved by the Secretary of the Interior under date of October 6, 1920, and contains thirteen printed pages. We find in regulation No. 3 language in substance to the effect that the granting of a permit or lease for the development or production of oil or gas will not preclude other permits or leases of the same land for the mining of other minerals under the act, "all to the end that the full development of the mineral resources may be secured." On page 36 of the appendix, above mentioned, we find it again declared, in effect, that the purpose of the act was "to the end that the best development of the lands, both for mineral and agricultural purposes, may be accomplished." We thus have constructions by the Secretary of the Interior of the purpose of the legislation in question, that it is that the full development of the mineral resources may be secured.

With scrupulous care the act reserves certain lands from its operation by "excluding lands acquired under the act known as the Appalachian Forest Act, approved March 1, 1911 (36 Statutes, 961), and those in national parks, and in land withdrawn or reserved for military or naval uses or purposes, except as herein provided." (Section 1.) It enacts that the act shall operate upon deposits of oil, oil shale, or gas, and lands containing such deposits owned by the United States including those in national forests.

The duty of executing the provisions of this act is conferred upon the Secretary of the Interior, and nowhere in the act, in the opinion of the court, is any power to suspend its operation or dispense with its execution conferred upon him. And this court is further of the opinion that no power resides in either the executive or judicial branches of the Government to suspend or dispense with the execution, administration, and enforcement of a constitutionally enacted law of the Congress.

In each of the four cases mentioned above the writ of mandamus will issue, in the McLennan, Retherford, and

Paris cases, directing the Secretary of the Interior to reinstate the applications of relators and proceed therewith according to law, and in the Pyron case directing the Secretary of the Interior to accept for filing and file the application of relator and proceed therewith according to law.

Orders accordingly will be settled and signed on presentation and notice.

F. L. Siddons, Justice.

April 15, 1930.

Opinion of Mr. Justice Bailey, of the Supreme Court of the District of Columbia, as it appears in the record in case No. 5241 in the Court of Appeals of said District, entitled Ray Lyman Wilbur, Secretary of the Interior, appellant, vs. United States of America ex relatione Roy G. Barton, and also as it appears in the record in case No. 5242 in said Court, entitled Ray Lyman Wilbur, Secretary of the Interior, appellant, vs. United States of America ex relatione Richard D. Vedder, which opinion is included in this transcript by designation of counsel.

OPINION—Filed April 8, 1930

* * * * * * *

The act of Congress of February 25, 1920, provides "That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the act known as the Appalachian Forest act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this act to citizens of the United States," etc. The title of the act is "An act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," and its purpose is clearly to promote the prospecting for oil, gas, etc., on public lands, not theretofore known to be productive of minerals of this character. Section 13 of this act provides "That the Secretary of the Interior is hereby

authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this act, a prospecting permit," etc.

The Secretary contends that Congress by the use of the word "shall" in the one case and the words "is hereby authorized" in the other intended that the granting of permits should be wholly in the discretion of the Secretary and that he could at all times and for any reason refuse to issue permits and entirely suspend the operation of the statute. But that the purpose of the act was "that the full development of the mineral resources may be secured," was recognized in these words by the Secretary in the regulations made by him under this act (No. 3). It is true that in rule No. 2 the Secretary did provide, "It should be understood that under the act the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior, and any application may be granted or denied, either in part or in its entirety, as the facts may be deemed to warrant." It is only recently, however, that the contention has been made that under this provision the Secretary may refuse to grant any permits at all. While it may be that the Secretary may deny individual applications "as the facts may be deemed to warrant," his discretion is not to be exercised arbitrarily and without regard to law, as is shown by the decision of the Court of Appeals in the Alling case. That the use of the words "is authorized" above does not necessarily vest him with such discretion as is claimed by him, is shown by the use of the same expression in section 32 of the act of 1920, where it is clearly mandatory. As to the effect under any construction of rule 2 it may be said that the Secretary can not add to his powers by any rule or regulation made by him.

In my opinion this act does not give the Secretary of the Interior nor the President any such power as is claimed by the Secretary. I think that the discretion vested in the Secretary is a judicial one and not an absolute one; that the word "authorized" in section 13 of the act refers to the manner of granting permits, the determination of the qualifications of the applicants, and matters of that nature under the rules and regulations promulgated by him and that the decision in the Alling case is conclusive of this question.

The authority given to him by Congress is that he may "do any and all things necessary to carry out and accomplish the purpose of this act," and not to defeat the will of Congress by suspending its operation.

Any authority then for the action by the Secretary of the Interior must be found in the act of 1910, which fixed the power of the Executive to withdraw any part of the public domain from settlement, etc. But as to this it is sufficient to say that the action of the Secretary does not constitute a withdrawal under that act. It can not be held to be such a withdrawal, for it does not appear to be of temporary nature; the lands withdrawn are not withdrawn from either settlement, location, sale, or entry; the purpose of the withdrawal is not for any of the purposes specified in that act; these purposes are not specified in the order of withdrawal; and the withdrawal was not reported to Congress in accordance with the act. In addition, it may be said that it is by no means clear that the President has authorized the Secretary of the Interior to make the withdrawal. The latter bases his authority upon a newspaper report of a statement made by the President and does not set up any direct order of the President to himself either orally or in writing.

A writ of mandamus will issue in each case directing the Secretary of the Interior to reinstate the applications of the relators and to proceed therewith according to law.

Bailey, Justice.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5247

RAY LYMAN WILBUR, Secretary of the Interior, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione ETHEL M. McLENNAN, Appellee

DESIGNATION OF RECORD

The Clerk will please prepare a transcript on application for certiorari to the Supreme Court of the United States

in the above-entitled cause, including therein the following:

1. The printed record in the Court of Appeals.

1½. Minute entry allowing Chester I. Long to appear, etc., as amicus curiæ.

2. Minute entry showing argument of cause.

3. Judgment or decree of the Court.

4. Opinion of this Court and dissenting opinion in the case of Ray Lyman Wilbur, Secretary of the Interior, Appellant, vs. United States of America, ex rel. Roy G. Barton, Appellee, No. 5241.

5. Opinion of Mr. Justice F. L. Siddons, dated April 15, 1930, in the Supreme Court of the District of Columbia in the case of W. B. Pyron vs. Ray Lyman Wilbur, Secretary of the Interior, et al, at Law No. 77,631, being part of the printed transcript of record in No. 5250 of this court.

6. Opinion of Mr. Justice Jennings Bailey, dated April 8, 1930, in the Supreme Court of the District of Columbia, in the case of United States Ex Rel. Richard D. Vedder vs. Ray Lyman Wilbur, Secretary of the Interior, at Law No. 77,638, and United States Ex Rel. Roy G. Barton vs. Ray Lyman Wilbur, Secretary of the Interior, at Law No. 77,386, being part of the printed transcript of record in No. 5241 of this court.

7. This designation.

8. Clerk's Certificate.

L. E. Hoffman, Attorney for Appellee.

A copy of the foregoing acknowledged this 5 day of December, 1930.

O. H. Graves, Attorney for Appellant.

[Endorsed:] In the Court of Appeals of the District of Columbia. No. 5247. Ray Lyman Wilbur, Secretary of the Interior, Appellant, vs. The United States of America Ex Relatione Ethel M. McLennan, Appellee. Designation of Record. Lewis Edwin Hoffman, People's Life Insurance Bldg., Washington, D. C. Law offices Long, Chamberlain & Nyce, National Press Building, Washington, D. C. Court of Appeals, District of Columbia. Filed Dec. 5, 1930. Henry W. Hodges, Clerk.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered 1 to 42, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals as designated by counsel in the case of Ray Lyman Wilbur, Secretary of the Interior Department, Appellant, vs. The United States of America ex relatione Ethel M. McLennan, No. 5247, October Term, 1930, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 8th day of December, A. D. 1930.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. [Seal Court of Appeals, District of Columbia.]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 2, 1931

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.